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No. 80-1837

In The

Supreme Court of the United States

October Term, 1981

FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, a Corporation; FAITH CHRISTIAN SCHOOL, LOUISVILLE, NEBRASKA; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Appellants,

vs.

STATE OF NEBRASKA, EX REL. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Nebraska Supreme Court err in upholding the injunction against operation of the Faith Christian School until such time as that school was willing to come into compliance with the Nebraska statutes governing education?

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FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, a Corporation; FAITH CHRISTIAN SCHOOL, LOUISVILLE, NEBRASKA; EVERETT SILEVEN; EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES; KENNETH HEARD; DAVE CARLSON; and WALTER PETERSON,

Appellants,

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Appellees.

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MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 16(1)(b), the appellees move to have this Court dismiss the appeal herein. It is clear that the appellants have failed to raise a substantial federal question. The issues which have been raised are all of insufficient magnitude, and all have been foreclosed by prior decisions of this Court.

STATEMENT OF THE CASE

On July 16, 1979, a hearing began in the District Court of Cass County, Nebraska (hereinafter, "District Court"), in which the appellees sought to permanently enjoin the operation of the Faith Christian School until such time as that school came into compliance with the laws of the State of Nebraska. As a result of that hearing, the District Court found, inter alia, that:

> 1. That the defendant Faith Baptist Church, through its officers and directors, is conducting a private school in Louisville, Cass County, Nebraska;
>
> . . .
>
> 3. That the defendants Tressie Sileven, Martha Gilbert and Helen Aldrich are performing the functions of teachers in said school without holding a Nebraska teaching certificate as required by law;
>
> 4. That none of the administrators or teachers have filed certificates with the county superintendent of Cass County, Nebraska, as required by law;
>
> 5. That the administrators of said school have failed to file a fall approval report in each of the years that the school has been operated in violation of the rules and regulations of the Department of Education;
>
> . . .
>
> 7. That the defendant Faith Baptist Church and its officers, to-wit: Reverend Everett Sileven, Reverend Edgar Gilbert, Kenneth Heard and Dave Carlson have failed to seek initial approval status as an approved school system as required by the rules and regulations of the Department of Education;
>
> 8. That each of the individual defendants in concert or individually have generally failed to comply with the school laws of the State of Nebraska in

the operation of a private school and that an injunction should be granted in accordance with the prayer of the petition.

The appellants appealed the issuance of the above stated injunction to the Nebraska Supreme Court. They contended, inter alia, that the injunction violated their rights under the First, Ninth and Fourteenth Amendments to the United States Constitution. It should be noted that the appellants in no way denied their continuing violation of the statutes in question.

The opinion of the Nebraska Supreme Court, which is published at 207 Neb. 802, 301 N. W. 2d 571 (1981), begins with a review of the relevant state statutes and regulations. The Court summarized these by saying:

> Neb. Rev. Stat. § 79-201 (Reissue 1976) requires that every person having charge or control of any child between the ages of 7 and 16 "shall cause such child to attend regularly the public, private, denominational, or parochial day schools each day that such schools are open and in session. . . ." Among other things, Neb. Rev. Stat. § 79-328 (Reissue 1976) requires that the State Board of Education shall have the power and duty to provide "supervision of the state school system"; to "establish . . . procedures for classifying, approving, and accrediting schools . . . for the continued legal operation of all schools"; and to "cause to be published laws and regulations governing the schools." In addition, the State Board of Education has caused to be promulgated and published Rule 14, which contains regulations and procedures for approving the continued legal operation of all schools. That rule provides: "Only school systems approved for continued legal operation by the State Board of Education are considered to be providing a program of instruction which is in compliance with the compulsory attendance laws." It

goes on to set forth what the curriculum shall consist of, and prescribes for the use of necessary materials and equipment, the length of the school day and year, and requirements relating to health and safety. Additionally, it requires the filing of a "Fall Approval Report" and an "Annual Term Summary Report," and, in order for a school to become approved and remain so, it mandates that each professional staff member employed by the school must "hold a valid Nebraska certificate or permit issued by the State Board of Education legalizing him or her to teach the grades or subjects to which elected." Rule 21, also adopted by the State Board of Education, provides rules for the issuance of certificates and permits to teach in Nebraska schools. Generally speaking, in order to qualify for a regular certificate, it is necessary that the applicant have obtained a baccalaureate degree.

The Nebraska Supreme Court (whose reasoning will be presented within the "argument" section of this brief) specifically held that application of these statutes to the appellants did not constitute an infringement of their constitutional rights, as those rights have been defined by the United States Supreme Court. Accordingly, the decision of the District Court was affirmed.

REASONS TO DISMISS THE APPEAL

I.

The appellants have failed to raise a substantial federal question.

A.

An appeal from a state court decision should be dismissed if it does not present a substantial federal question. This is mandated by Supreme Court Rule 16(1)(b). Where, as here, one seeking appeal claims that there has been an infringement of his right to free exercise of religion, and/or privacy, it is *his affirmative burden* to demonstrate the "coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School Dist. v. Schempp,* 374 U.S. 203, 223 (1963); *see also, Board of Education v. Allen,* 392 U.S. 236, 248 (1968).

In the petition at bar, the appellants do not at any time, in any way, show how the statutes in question inhibit their rights either to the free exercise of their religious beliefs, or to parental privacy. They do not, because they cannot.

The affirmative burden on the appellants is the same regardless of whether they ground their argument on the free exercise clause of the First Amendment or on their parental privacy rights they see in the Ninth and Fourteenth Amendments. In either case the parties seeking an appeal must demonstrate that, in fact, the right in question has been infringed on. Should this burden not be met, it is clear that the moving party has failed to present a substantial federal question, and the appeal should therefore be dismissed.

In *State v. Shaver,* 294 N.W. 2d 883 (N.D. 1981) the North Dakota Supreme Court was faced with essentially the exact same set of facts and issues which are involved here. In analyzing the First Amendment claim made by

the Bible Baptist Church, the North Dakota Supreme Court said:

> At the outset, it is important to recognize that when a statute imposes a burden on religion, the statute is not automatically unconstitutional. . . as the United States Supreme Court said in *Braunfeld v. Brown*, . . . "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."

Id. at 888.

The same analysis can and has been applied with regard to the Ninth and Fourteenth Amendments. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court upheld a decision of the Fourth Circuit Court of Appeals which had enjoined certain private schools from denying entry to students based solely on their race. In considering the school's claim of a constitutional defense the Supreme Court said:

> It is clear that the present application of § 1981 infringes no parental right recognized in *Meyer, Pierce, Yoder,* or *Norwood.* No challenge is made to the petitioner schools' right to operate or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school. . . . Meyer and its progeny entitle them to no more.

(Emphasis added.) *Id.* at 177. The *Runyon* Court then went on to specifically conclude that the parental privacy rights of parents are in no way compromised by reasonable state regulations in the area of education. *Id.* at 178.

The statutes of the State of Nebraska do not deny the appellants the right to operate a private school. The statutes do not deny them the right to use the A.C.E.

curriculum, nor to teach the religious beliefs which they feel bound to impart to their children. Given the fact that the appellants here are totally free to believe and teach what they will, it is obvious they have not, and cannot, demonstrate an infringement of their constitutional rights. All that the State of Nebraska requires is that the appellants comply with certain minimal requirements. Requirements which in no way inhibit the belief or teaching of religion.

B.

The appellants try to create the illusion of an infringement of their rights by claiming that the school is an arm of the church and is therefore exempt from compliance with *all state statutes.* (Brief of the appellants page 4.) Far from establishing this questionable proposition of law however, the appellants fail even to support it with reason and/or authority.

There is no explanation of how a church operated private school can be an arm of the church any more than any other church-owned property or business. However, even assuming arguendo that the school enjoys all the same protections as the church itself, that in no way can provide a blanket exception from "all state regulation."

The appellants' claim of total exemption from state control due to rights granted under the First, Ninth, and Fourteenth Amendments has in fact been foreclosed against them by prior decisions of the Supreme Court. Once an issue has been foreclosed by prior Supreme Court decisions, there is of course, no longer any possibility of a substantial federal question. *Leonard v. Viksburg,* 198 U. S. 416, 422 (1904).

From 1878, in the case of *Reynolds v. United States,* 98 U. S. 145 (1878), to the present, the Supreme Court has consistently held that while freedom to "believe" is absolute, the freedom to "act" is not. *See also, Cantwell v. Connecticut,* 310 U. S. 296 at 303-304 (1940); *Braunfeld v. Brown,* 366 U. S. 599 (1971); *Gillette v. United States,* 401 U. S. 437 (1971). Mr. Chief Justice Krivosha in the Nebraska Supreme Court decision below, quoted Chief Justice Burger in the case of *Wisconsin v. Yoder,* 406 U. S. 205 (1972) to the same effect where he said:

> Chief Justice Burger noted: "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. . ."

207 Neb. at 818-819.

Thus, the belief action distinction has been established beyond question. Even the application of this belief-action dichotomy to the area of education has been foreclosed by prior decisions of the Supreme Court. These decisions are uniformly opposed to the appellants' position. In *Meyer v. Nebraska,* 262 U. S. 390 (1923), the Supreme Court said: "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instruction in English, is not questioned." *Id.* at 402. Two years later, in *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), the Supreme Court expanded on this by saying: "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children

attend some school." *Id.* at 534. Later, in *Prince v. Massachusetts,* 321 U. S. 158 (1944), the Supreme Court held: "And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance." *Id.* at 166.

The position taken in *Meyer, Pierce,* and *Prince,* was recently resubstantiated in the case of *Lemon v. Kurtzman,* 403 U. S. 602 (1971). In that case the Supreme Court held: "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Id.* at 613. "Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts." *Id.* at 614. In *Runyon, supra,* the Supreme Court summed up by saying:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. . . . Indeed, the Court in Pierce expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils."

427 U. S. at 178-179.

C.

The appellants have failed to raise a substantial federal question. Indeed, the appellants have totally failed to demonstrate any coercive effect of the Nebraska regulations as the same allegedly operate against them in the

practice of their religion Like Don Quixote, the appellants are simply fighting windmills. Under the Nebraska regulations the appellants may believe anything they wish. Also, the appellants may operate a private school provided they come into compliance with certain Nebraska regulations. These regulations in no way affect (let alone infringe on) any rights the appellants may have under the First, Ninth, or Fourteenth Amendments. Consequently, this appeal should be dismissed.

II.

Even if the statutes in question have some small effect on a right of the appellants, the minimal intrusion is fully justified by the compelling state interest in education.

A.

It has previously been established that the statutes attacked in this appeal do not affect any constitutional rights that the appellants may have. This, it was suggested, was in itself dispositive of their appeal. However, even if a minimal intrusion could in some way be shown, this would clearly be justified due to the compelling state interest in having adequate education for th young, and the need for the statutes in question to reach that goal.

That the state does indeed have a compelling interest in the area of education, has been firmly established. This interest was most succinctly set out in the case of *Brown v. Board of Education*, 347 U. S. 483 (1954). In that case the Supreme Court declared:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures

> for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493.

The compelling interest in education was also recognized in *Wisconsin v. Yoder, supra,* where it was said: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Id.* at 213. Most recently the Supreme Court in *Wolman v. Walter,* 433 U. S. 229 (1977) stated: "There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. . . . The State may require that schools are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction." *Id.* at 240.

Thus the state has a compelling interest in the education of the young. This was the clear and well-reasoned holding of the North Dakota Supreme Court in the highly analogous case of *State v. Shaver, supra.* In that case the Court expressly held:

> The burden on the parents' free exercise of religion in the present case is minimal, and is far outweighed by the state's interest in providing an education for its people. The rights guaranteed by the Free Exercise Clause of the First Amendment are not absolute and totally free from all legislative re-

> strictions. The Constitution does not withdraw from states the power to safeguard their vital interests. The incidental burden on the free exercise of the parents' religion as a result of the state approval requirement is justified under the circumstances *by the state's compelling interest in the regulation.* The record clearly shows that compulsory school attendance *at an approved school* would *not* pose a very real threat of undermining the Bible Baptist Church members' community and religious practices as they exist today.

(Emphasis added.) 294 N. W. 2d at 897.

Courts have in numerous cases upheld against free exercise claims certain government interests which were not nearly as compelling as the state's interest in education. In *Church of Scientology of California v. Richardson,* 437 F. 2d 214 (9th Cir. 1971), the court upheld the right of the government to refuse admission of E-meters into the country on grounds that they were misbranded, despite claims by the church that E-meters were used in the religious practice of scientology. "The . . . court held that the exercise of religious freedom does *not* include the freedom to violate the Federal Food, Drug, and Cosmetic Act." *Id.* at 217. Another court upheld the discharge of a Seventh Day Adventist who refused, on First Amendment free exercise grounds, to pay union initiation fees or dues pursuant to a union shop contract negotiated under the National Labor Relations Act by the union representing the unit in which she worked. *Linscott v. Miller Falls Company,* 440 F. 2d 14 (1st Cir. 1971), *cert. den.,* 404 U. S. 872 (1971). In that case the court found that the governmental interests in the union shop, in promoting industrial peace, and in requiring a fair sharing of the costs of collective bargaining outweighed the

plaintiff's First Amendment claims. The court related this to the case of *Sherbert v. Verner*, 374 U. S. 479 (1960) by using this comparison: "In the present case the interests are not merely that of the plaintiff versus the cost to the fisc [as in Sherbert]; opposed to plaintiff's interest are both the public and the private interests in collective bargaining and industrial peace." *Id.* at 18.

In short, South Carolina lost in *Sherbert* because its interest in protecting its treasury from comparatively few claims was not sufficient to outweigh the loss of basic livelihood and necessities which Mrs. Sherbert would have undergone by maintaining her refusal to accept Saturday work. Nebraska's interest in the present case is far greater than a few mere claims upon the public treasury; its interest in education ranks at least as great as, and undoubtedly greater than, keeping misbranded E-meters out of the country, or maintaining industrial peace through enforcing a union shop clause.

The three standards which the appellants are being required to meet are all *necessary* to assure quality education in the state. The state in effect mandates: (1) attendance reports, indicating which children are enrolled in the school; (2) state approval of the school's secular curriculum; and, (3) that the school employ only certified teachers in teaching capacities.

The need for attendance reports to assure that the state interest in education is being met is obvious. It is universally recognized that the state has the power to compel all children to attend some school and receive an adequate secular education. *Wolman v. Walter, supra.* As a corollary to this, it is fundamental that the state must have a means of knowing where each child is en-

rolled. Without attendance reports it would be fundamentally impossible for the state to know what child was where; it would thus also be impossible for the state to know if mandatory attendance laws were being complied with. It defies logic to see how the requirement of third day attendance reports could adversely affect the appellants' rights, however, any minimal intrusion (were it to exist) is fully justified here.

The requirement of state approval of the school's secular curriculum is equally necessary. *Palmer v. Board of Ed. of City of Chicago*, 603 F. 2d 1271, 1274 (7th Cir. 1979), *cert. den.*, 444 U. S. 1026 (1980). If the state were to be limited to compelling the child's attendance at some school, while at the same time having no further control over the learning experience once the child is in attendance, the state's interest would be rendered meaningless. The state would be forced, in effect, to give up all supervision of education. It has been admitted in this case, that the Faith Christian School uses the A. C. E. curriculum, which is acceptable to the State. However, that may not always be the case. It is highly possible that if an exemption such as the Faith Baptist Church wants here is granted, other groups claiming to have a "religious school exemption" could develop a curriculum which teaches concepts diametrically opposed to the state's interest. Anything could be taught, because there would be absolutely no supervision in that instance. The point is, that if the state is not allowed this minimal oversight power, its entire interest in education (which is a compelling interest) can be, and probably would be, effectively, lost. Again it seems more than clear, that any possible intrusion on the appellants' rights from this regulation

would be very slight, and that the regulation is itself absolutely necessary.

The third requirement in question, teacher certification, is also an absolutely necessary one for the state's regulatory function in the area of education. The state has not only the right, but also a duty, to see to it that those who teach its youth meet certain minimal standards of qualification.

A certified teacher in conformance with Rule 14 (this rule is fully set out in the appellants' brief at page App. 55) *could* teach the A.C.E. curriculum. Therefore, any incidental burden that this requirement may place on the Faith Christian Church is essentially negligible. The curriculum will be taught one way or the other.

Although certification is possibly not a 100 percent effective mechanism for keeping unqualified individuals out of teaching, it is highly effective. The federal courts have uniformly accepted the concept that a state, in its watchdog capacity over the public welfare, does have a right to license members of the various professions. *See, e.g., Turner v. The American Bar Association,* 407 F. Supp. 451 (N.D. Tex. 1975), *aff'd sub nom., Taylor v. Montgomery,* 539 F. 2d 715 (7th Cir. 1976), *aff'd sub nom., Pilla v. Am. Bar Ass'n,* 542 F. 2d 56 (8th Cir. 1976).

The Nebraska Supreme Court in the case at bar, accepted teacher certification on essentially the same rational. The Court upheld the certification requirement by saying:

> We are not suggesting as an absolute that every person who has earned a baccalaureate degree in teaching is going to become a good teacher, any more

> than one who has obtained the appropriate training and education will become a good engineer, lawyer, beauty operator, welder, or pipefitter. However, we think it cannot fairly be disputed that such a requirement is neither arbitrary nor unreasonable; additionally, we believe it is also a reliable indicator of the probability of success in that particular field. We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.
>
> The cases we have cited from the Supreme Court of the United States should leave no doubt as to the critical interest which the State has in the quality of the education provided its youth. Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government requlations *as to the quality of the education furnished.*

(Emphasis added.) *Id.* at 816-817.

The state has a compelling interest in the area of education. Each of the requirements which the Faith Christian School is being asked to meet are reasonable, minimal, and necessary. They are fully justified.

B.

The appellants in the appeal at bar fail to press any alternative means of educational quality control, although they did so below. This is as it should be, because once the need for some type of control is established, the choice as to which reasonable means the state will use becomes totally one of a political question. Beyond this, it should be recognized that, at this time there is *no less restrictive means* of assuring quality teachers in education than the requirement of certification. *See, e.g.*, the concurring

opinion of Justice Vande Walle, in *State v. Shaver, supra*, at page 901.

C.

In the state courts below, the appellants recognized that the issues which they had raised had already been decided against them in Nebraska, in the case of *Meyerkorth v. State*, 173 Neb. 889, 115 N.W. 2d 585 (1962). The sole argument which they raised in this regard was that *Meyerkorth* was no longer the law after the United States Supreme Court decision in *Yoder, supra*. This claim however was thoroughly analyzed, and eventually rejected by the Nebraska Supreme Court.

Dismissal of the appeal now before the Court is totally consistent with the principles set out in *Yoder*. *Yoder* stands for the broad principle that any state regulation of education which affects a segment of society's religious beliefs, must meet the compelling state interest test. As the state has already shown (see our argument 2A above) this test is, in fact, met by the Nebraska regulations.

In spite of the appellants' contentions, *Yoder* cannot legitimately be expanded to the proposition that religious schools are exempt from all state regulation. In *Yoder* the Supreme Court declared: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 406 U.S. at 213. The Supreme Court went on to conclude: "Nothing we hold is intended to undermine the general

applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards." *Id.* at 236. Thus, *Yoder* in no way limits the powers of the state in the area of education. It requires only a balancing of the state's interest against the effect on the right asserted. That balancing in this case, as has been demonstrated, comes out totally in favor of upholding the state regulations in this case.

The concurrence to the decision in *Yoder,* written by Mr. Justice White and joined by Mr. Justice Brennan and Mr. Justice Stewart made the point even more clearly by saying: "This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State." 406 U.S. at 238. This appeal is that different case referred to by Justice White. The appellants seek to escape all state regulation in the area of education. Nowhere, has the Supreme Court ever hinted that such a thing would be permissible. Opinions to the contrary however abound. Indeed, the *Yoder* decision is fully consistent with the dismissal of this present appeal.

CONCLUSION

For the foregoing reasons the appellees request that this Court, pursuant to Supreme Court Rule 16(1)(b), dismiss the appeal in this case.

Respectfully submitted,

STATE OF NEBRASKA, Appellees

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